



**In the Supreme Court of the United States**

**OCTOBER TERM, 1972**

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**THE RENEGOTIATION BOARD, PETITIONER,**

**v.**

**BANNERCRAFT CLOTHING COMPANY, INC.;  
ASTRO COMMUNICATION LABORATORY,  
A DIVISION OF AIKEN INDUSTRIES, INC.;  
DAVID B. LILLY CO., INC., RESPONDENTS.**

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**PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**BRIEF IN OPPOSITION FOR RESPONDENT  
DAVID B. LILLY CO., INC.**

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**OPINION BELOW**

The opinion of the Court of Appeals (Pet. App. A. 1a-44a) is reported at 466 F.2d 345. The Findings of Fact, Conclusions of Law and Order of the District Court

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<sup>1</sup> Respondents Bannercraft Clothing Co., Inc. and Astro Communication Laboratory, a Division of Aiken Industries, Inc. are represented by separate counsel, who are filing a Brief on their behalf.

in *David B. Lilly Co., Inc. v. The Renegotiation Board* (Pet. App. B. 50a-60a) are unreported.

### JURISDICTION

The judgment of the Court of Appeals was entered on July 6, 1972. On October 4, 1972, the Chief Justice extended the time within which to file a Petition for a Writ of Certiorari to November 18, 1972. The Chief Justice, on November 8, 1972, granted a further extension of time to December 4, 1972, and the Petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### QUESTION PRESENTED

Where, during the course of renegotiation proceedings, the Renegotiation Board ("Board") refuses to produce certain documents requested by the contractor, and where the contractor files an action under the Freedom of Information Act to obtain those documents,<sup>2</sup> does the District Court have the power to preliminarily enjoin the Board from proceeding further, until the Court can, on an expedited basis, rule on the contractor's entitlement to such documents for its use in the renegotiation proceedings?

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<sup>2</sup>The applicability of the Freedom of Information Act to the Renegotiation Board is not disputed. *Grumman Aircraft Engineering Corp. v. The Renegotiation Board*, 138 U.S. App. D.C. 147, 425 F.2d 578 (1970).

### STATUTES INVOLVED

The relevant sections of the Freedom of Information Act, 5 U.S.C. §551 *et seq.*, and of the Renegotiation Act, 50 U.S.C. App. §1211 *et seq.*, are set forth in Pet. App. C. 61a-67a.

### STATEMENT OF THE CASE

The United States District Court for the District of Columbia preliminarily enjoined the Renegotiation Board from conducting further renegotiation proceedings with regard to the fiscal year 1967 of David B. Lilly Co., Inc., until the Court could determine the enforceability of a request (made under the Freedom of Information Act and which the Board had totally denied) for documents relating to, and needed in, that proceeding.

During 1967, Respondent David B. Lilly Co., Inc.<sup>3</sup> ("Lilly") was engaged in the performance of certain contracts or subcontracts, which were subject to the Renegotiation Act of 1951, as amended. 50 U.S.C. App. §1211 *et seq.* (Joint App. 83a, 117a).<sup>4</sup> After Lilly filed the standard form of contractor's report ("RB-1") with the Renegotiation Board for 1967, renegotiation proceedings were commenced. As the initial step, the

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<sup>3</sup>The contracts and subcontracts subject to renegotiation were performed by David B. Lilly Co., Inc., and Delaware Fastener Corporation. After the renegotiation proceedings were commenced, more particularly in January 1970, Delaware Fastener Corporation was merged into David B. Lilly Co., Inc., which brought the instant case on its own behalf and as successor to Delaware Fastener Corporation by merger (Joint App. 73a).

<sup>4</sup>References to the Joint Appendix filed in the United States Court of Appeals for the District of Columbia Circuit are cited "Joint App."

Eastern Regional Renegotiation Board assigned the case to two members of its staff, an auditor and a renegotiator (Joint App. 74a, 117a). Over an extended period of time, an intensive investigation of the contractor was conducted. Information was obtained by the Eastern Board's staff from the contractor as well as from separate outside sources. At no time did anyone from the Board advise Lilly of the information which had been obtained independently, the source of such information, or the significance placed on any particular information (Joint App. 75a, 84a).

At a renegotiation conference held June 4, 1970, Lilly was told, for the first time, that the renegotiator had determined that there were excessive profits totaling \$700,000 for fiscal 1967 (Joint App. 75a, 80a, 84a). The renegotiator advised that Lilly could (1) accede to the \$700,000 determination, (2) take an appeal to a panel of the Eastern Regional Board, which, the renegotiator pointed out, had already tentatively approved the determination two weeks earlier, without notice to Lilly, or (3) appeal directly to the Statutory Board (Joint App. 75a, 84a, 118a). Lilly was given until July 10, 1970 to decide what course to follow; and Lilly was told that if it did not elect by July 10, 1970 to appeal to the Eastern Regional Board, it would lose that right completely (Joint App. 84a-118a). While the Eastern Board staff advised that Lilly was being treated consistently with the way in which other similarly situated contractors were treated, no disclosure was made as to what comparisons or comparative data had been used or as to any other factual data on which the determination had been based, other than the financial data which had come from the contractor itself (Joint App. 85a, 118a).

Before hazarding an appeal in which the Eastern Board or the Statutory Board could increase the amount of allegedly excessive profits, or acquiescing, on insufficient knowledge, in the renegotiator's \$700,000 determination, Lilly wanted to know the facts on which the renegotiator's determination was predicated, and the significance given to such facts. This information was needed not only to correct possible erroneous factual premises and perhaps present rebuttal information, but also to make an enlightened decision as to how to proceed administratively and as to what kind of effective presentation to prepare and make (Joint App. 84a, 85a).

Prior to the July 10 deadline, in an effort to obtain data necessary to make an intelligent and informed judgment as to how to proceed, Lilly requested that the Board provide it with information in certain enumerated categories (Joint App. 80a). On July 9, 1972 (the day before the Board's imposed deadline), Lilly still had received no response from the Board, which was insisting on its ultimatum that Lilly either acquiesce in the \$700,000 determination, or, by July 10, 1970, elect (at the risk of losing) its right to appeal to the Eastern Regional Board. Lilly, on July 9, 1970, filed a complaint in the District Court seeking an order compelling the Board to provide the requested information and a stay of further administrative proceedings until the matter of the contractor's right to information was resolved (Joint App. 83a, 85a, 86a, 87a). By stipulation, counsel for the Board agreed to lift the ultimatum and advised that the Renegotiation Board would give consideration to Lilly's request for documents (Joint App. 92a, 95a).

By letter dated July 24, 1970, the Board's General Counsel denied the request for documents in its entirety, but advised that Lilly could have the Board review his

decision by making a request, in writing, within twenty days of the date of the letter (Joint App. 103a-105a).

On July 30, 1970, three days after Lilly's receipt of the General Counsel's letter, the Eastern Regional Board, despite the contractor's twenty day period to appeal the denial of documents, demanded that the contractor decide by the close of business on the next day (July 31, 1970) either to pay the \$700,000 or to appear before a panel of the Eastern Regional Board on August 12, 1970 (Joint App. 93a). Lilly asked that a later date be selected in order to permit the Board to review the decision of its General Counsel. The Eastern Regional Board refused, insisting on a hearing on that date, whether or not the request for documents was still unresolved (Joint App. 93a). In addition, the Eastern Regional Board imposed a new ultimatum. Originally, the Eastern Regional Board had threatened that if Lilly did not meet the July 10 deadline, it would lose its right to appeal to the Eastern Regional Board. The new ultimatum was that either Lilly appear on August 12, or the Eastern Regional Board would review the matter in its absence, at which review the \$700,000 amount could be increased (Joint App. 93a).

The next day the contractor renewed its Application for a Temporary Restraining Order to avoid the latest ultimatum (Joint App. 89a). Counsel for the contractor and counsel for the Renegotiation Board appeared before the District Court, which, after brief argument, entered a Temporary Restraining Order (Joint App. 97a-99a). The Restraining Order was extended to August 20, 1970, on which date a hearing was scheduled on Lilly's Motion for a Preliminary Injunction (Joint App. 100a-101a). On August 14, 1970, the Renegotiation Board advised that it

would not permit access to any of the documents needed (Joint App. 108a).

Despite the fact that Lilly's action was filed in the District Court on July 9, 1970, it was not until August 20, 1970, minutes before the hearing on Lilly's Motion for a Preliminary Injunction, that the Board filed its first pleadings—a Motion to Dismiss the Complaint, or in the Alternative for Summary Judgment, and An Opposition to the Motion for a Preliminary Injunction (Joint App. 102a, 119a). After a hearing on August 20, 1970, the District Court issued a preliminary injunction against further proceedings until the Board's Motion to Dismiss the Complaint could be heard. Because that Motion to Dismiss had been filed on the morning of the hearing, the District Court gave the contractor time to respond, and indicated it would set a date for a hearing on the Board's Motion. Without waiting for such hearing, and without delivering the disputed documents to the District Court for an *in camera* inspection, the Board filed a Notice of Appeal from the Findings of Fact, Conclusions of Law and Preliminary Injunction Order entered by the District Court on September 1, 1970 (Pet. App. B. 50a-60a). Thereafter, on appeal, the Court below affirmed the preliminary injunction, and the present Petition was filed. The District Court has not, in view of the Board's appeal and Petition, been called upon to rule finally on the propriety of Lilly's request for documents.

#### REASONS FOR DENYING THE WRIT

Certainly it is an important question whether the express remedy provided in the Freedom of Information Act is the exclusive remedy, preempting all other equitable remedies such as the one ordered in the case at

bar. There is also an important question as to balancing the desire for judicially enforced fundamental fairness in administrative proceedings against the right of an agency to conduct its business with dispatch, without interruption and without being subordinate to intervening orders of the judiciary. We also recognize that there have been inconsistent decisions in the district courts on the issue (Pet. 9, n. 4). Despite these considerations, Lilly contends that, as to the merits, the decision of the majority below is correct, is fully consistent with governing authority and should stand as sound precedent for other cases. There should be, and is, judicial power to exercise discretion in issuing injunctions such as the one in the case at bar, and the only question in such cases should be, and is, whether that discretion has been abused, a question neither presented in this case nor one needing resolution by this Court. As to the points raised in the Petition, Lilly denies the Board's contention that the Freedom of Information Act, expressly or by "inescapable inference", prohibits an injunction such as entered in this case. Further, Lilly denies that the decision below conflicts with a decision of the Sixth Circuit so as to require resolution by this Court, and denies that the decision below is contrary to decisions of this Court.

### 1. *The Freedom of Information Act.*

Although the Freedom of Information Act includes a specific equitable remedy, it does not follow, as Petitioner contends (Pet. 5), that Congress intended to withhold from the District Court "any of the usual weapons in the arsenal of equity"<sup>5</sup> to effect the

<sup>5</sup>*Bannerkraft Clothing Co., Inc. v. The Renegotiation Board*, 466 F.2d at 354.

legislative intent. Historically, courts sitting in equity—as does the District Court under the Freedom of Information Act—have had broad powers to fashion complete relief not inconsistent with the expressed statutory purposes. *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292 (1960). Thus, as this Court has observed, when Congress confers equitable jurisdiction, it does so in light of this tradition,<sup>6</sup> and accordingly, as stated in *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946):<sup>7</sup>

[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

Although the Board argues that exercise of additional equity powers, regardless of the circumstance, "is inconsistent with and unnecessary to effectuate the Act's purposes" (Pet. 5, 6-8), neither statutory language nor legislative history supporting the Board's "inconsistent and unnecessary" thesis is cited. Here, neither expressly nor by "inescapable inference" does the Freedom of Information Act restrict the District Court to the specific equitable remedy provided in 5 U.S.C. §552(a)(3). It is this fact which renders inapposite the Renegotiation Board's reliance on *United States v. Babcock*, 250 U.S. 328 (1919). In *Babcock*, the Court of Claims attempted to review a decision of the Treasury Department where the statute expressly provided that the Treasury Department's decision "shall be held as finally determined, and shall never thereafter be reopened or considered." *United*

<sup>6</sup>*Clark v. Smith*, 13 Pet. 195, 203 (1839) cited with approval in *Mitchell v. Robert DeMario Jewelry, Inc.*, *supra*, at 292.

<sup>7</sup>See also, *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944).

*States v. Babcock, supra*, at 331. As the majority in the Court below correctly observed, although the principal object of the Freedom of Information Act was "opening administrative processes to the scrutiny of the press and general public,"<sup>8</sup> another and valid, albeit subsidiary, purpose was to alleviate "the plight of those forced to litigate with agencies on the basis of secret laws or incomplete information."<sup>9</sup> S. Rep. No. 813, 89th Cong., 1st Sess., 7 (1965); H.R. Rep. No. 1497, 89th Cong., 2d Sess., 8 (1966).<sup>10</sup> The Board's attempt to withhold information, while speeding the administrative proceedings to a close, by imposing inconsistent and burdensome

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<sup>8</sup>*Bannercraft Clothing Co., Inc. v. The Renegotiation Board*, 466 F.2d at 352.

<sup>9</sup>*Bannercraft Clothing Co., Inc. v. The Renegotiation Board*, 466 F.2d at 352.

<sup>10</sup>In its Petition, the Renegotiation Board suggests that "[i]t is at least arguable . . . the contractors must be thoroughly familiar with all the significant facts. . . ." [Pet. 11, n. 6] and that the sanction that unpublished opinions, policies, and rules may not be relied upon or cited against those without actual notice, adequately protects Lilly [Pet. 7, n. 3]. However, the Board based its determination of excessive profits, *inter alia*, on comparisons between Lilly and other "similarly situated contractors", comparative data, and factual and financial information gathered by the Board from undisclosed sources. None of this information has been made available to Lilly; and the "unpublished opinions" sanction has not induced the Board either to provide the data or not rely upon it. Without much of the basic information on which the initial determination was based, Lilly could hardly make an intelligent or informed judgment whether to accede to the renegotiator's determination or appeal to the Eastern Regional Board. And, if an appeal were elected, it could not present its case effectively without knowing what factual errors to correct or what arguments to make. Compare, *Gonzales v. United States*, 348 U.S. 407 (1955); *American Mail Line Ltd. v. Gulick*, 133 U.S. App. D.C. 382, 411 F.2d 696 (1969).

ultimatums, threatened a complete frustrating of this "subsidiary" congressional objective. By preserving the *status quo*, the injunctive remedy below assured the Board's compliance with the requirements of the Freedom of Information Act at a time when that compliance would be meaningful, as Congress intended. Such a result is in no way inconsistent with the Freedom of Information Act, or with any "inescapable inference" that may be drawn from that statute's provisions.

2. *The Decision of the Sixth Circuit in Sears, Roebuck and Co. v. National Labor Relations Board.*

While the Sixth Circuit's decision in *Sears, Roebuck and Co. v. National Labor Relations Board* 433 F.2d 210 (1970), might appear to conflict with the majority opinion below, any such conflict is more apparent than real. In *Sears*, the Sixth Circuit was faced with a situation where the agency's withholding of records, even if wrongful under the Freedom of Information Act,<sup>11</sup> did not cause the kind of irreparable harm required by *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938) to

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<sup>11</sup>In *Sears*, the District Court had concluded that the National Labor Relations Board had complied with the Freedom of Information Act. By contrast, here, the District Court concluded, in the face of the Renegotiation Boards blanket refusal to produce the requested documents, that:

There is a likelihood that plaintiff will prevail in whole or in part in its request for documents, and plaintiff's request does not, as a whole, appear frivolous. (Pet. App. 59a)

The Board's failure even to provide the requested documents to the District Court for an *in camera* inspection prevented the Court's finally resolving Lilly's entitlement to the documents.

permit enjoining administrative proceedings.<sup>12</sup> Under the National Labor Relations Act, as the Sixth Circuit noted, National Labor Relations Board decisions are reviewable in the United States Court of Appeals both as to substantive and procedural matters. 29 U.S.C. §160. On review, the Court can cure an NLRB denial of procedural rights by remanding the matter for a further, or new, and proper hearing. Thus, if Sears' statutory rights were frustrated by the NLRB's refusal to comply with the Freedom of Information Act before concluding its proceedings, the administrative proceedings could be reopened after Sears had secured a remand and a proper administrative hearing afforded. By contrast, the Renegotiation Act does not authorize any procedure to reopen the proceedings before the Board. The "review" in the United States Court of Claims in renegotiation matters does not permit an inquiry into any aspect of the Board proceedings; and it does not permit a remand to the agency to cure even the most flagrant error.<sup>13</sup> Thus, where a contractor is denied procedural rights in proceedings before the Board, those rights are forever lost, unless the proceedings can be held in abeyance until the District Court resolves the issue of the Board's compliance with the Information Act. It was in this setting that the majority opinion in the Court below concluded that the case at bar presented, as distinguished from

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<sup>12</sup>Interestingly, the District of Columbia Circuit reached the same result, though perhaps on different reasoning, in another case involving Sears and the NLRB. *Sears, Roebuck and Co. v. National Labor Relations Board*, Docket No. 72-1425, decided October 24, 1972 (D.C. Cir.).

<sup>13</sup>50 U.S.C. App. §1218 explicitly directs the United States Court of Claims to ignore all that has occurred during the agency proceedings.

*Sears*, "the sort of clear threat to a statutory right, which can easily be categorized as an impending irreparable harm" warranting Equity's intervention. *Bannercraft Clothing Co., Inc. v. The Renegotiation Board*, 466 F.2d at 356.

### 3. *Previous Decisions of this Court.*

Despite certain language quoted by the Board (Pet. 10) from this Court's decisions in *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752 (1947), *Lichter v. United States*, 334 U.S. 742 (1948), and *Macauley v. Waterman Steamship Corp.*, 327 U.S. 540 (1946), there is no real conflict between those cases and the decision of the majority below in this case. In the cited decisions of this Court, the contractors, by seeking judicial determinations which would have resolved questions as to the extent of their liability or susceptibility to renegotiation, were attempting to wrest from the Board and the Tax Court<sup>14</sup> matters expressly committed to them for decision. Here, unlike in the cited cases, there is no attempt to have the courts prematurely determine issues committed to the jurisdiction of the administrative agency. The decision below merely preserves the *status quo*; it has no substantive effect on the renegotiation proceedings. Moreover, contrary to Petitioner's assertion (Pet. 10), this Court did not, in *Aircraft & Diesel*, rule out the District Court's exercising its general equity jurisdiction in an appropriate case pending before the Renegotiation Board, i.e., a case where the contractor did not have an adequate

<sup>14</sup>On July 1, 1971, the Court of Claims replaced the United States Tax Court as the forum for the final *de novo* proceeding contemplated by the Renegotiation Act. 50 U.S.C. App. §1218 (1972 pocket part).

remedy at law. *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. at 773-774.

Since the District Court did not purport to resolve any substantive issues committed initially to the Board for its determination by the Renegotiation Act, and since Lilly did everything it could to obtain the data from the Board before seeking judicial intervention, there can be no valid contention that Lilly failed to exhaust its administrative remedies.

### CONCLUSION

Based on the foregoing, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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